



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC APPEAL NO 4 OF 2017

CECILIA NYAMBURA MURUNGA .....APPELLANT

VERSUS

JOHN NDUNG’U MAINA ..... RESPONDENT

*Being an appeal against the Judgment of the Honorable Senior Resident Magistrate A.B MONGARE at Nyahururu Principal Magistrate’s Court delivered on 10<sup>th</sup> January 2012*

*in*

*PMCC No. 118 of 2011*

**JUDGEMENT**

1. What is before me for determination on Appeal is a matter which was heard and decided by *A.B MONGARE SRM in the Principle Magistrate Court at Nyahururu in Civil Case No. 118 of 2011* where the learned trial Magistrate, upon taking the evidence of both parties, delivered his judgment on the 10<sup>th</sup> January 2012 directing that the Defendant/Appellant do transfer either of the two parcels of land still registered in her name to the Plaintiff/Respondent and to pay the cost of the suit plus interest from date of entering into the transaction.

2. The Defendant/Appellant, being dissatisfied with the judgment of the trial magistrate has filed the present Appeal before this court.

3. The grounds which the Appellant has raised in her Memorandum of Appeal include:

*i. That the trial Magistrate erred in law and in fact in holding that there was a valid contract between the parties.*

*ii. That the trial magistrate failed to consider the provisions of the law on agency relationship and finding against the appellant when the alleged agent was not made a party to the suit.*

*iii. That the trial magistrate failed to have regard to the express provisions of the law of the contract and the Land Control Act.*

*iv. That the trial Magistrate’s finding were against the law and a complete departure from established principles of law.*

*v. That the Magistrate erred in ordering specific performance in the absence of Land Control Board consent.*

*vi. The trial Magistrate was influenced by extraneous matters and considerations.*

*vii. That the finding of the trial magistrate were not supported by the evidence on record.*

*viii. That the trial Magistrate erred and misdirected herself in purporting to make contracts for parties and further ordering transfer of parcels of land which were not contracted for.*

*ix. That the trial magistrate made absurd and illogical orders relating to costs and interests.*

*x. The trial Magistrate erred and misdirected herself in relying solely on the submissions of the Respondent and failing to consider at all the Appellant’s submissions.*

4. The Appellant thus sought for;

- i. That the Appellant's Appeal be allowed.
- ii. The lower court's judgment be set aside.
- iii. That the Respondent's suit in the lower court be dismissed with costs.
- iv. That the Respondent be condemned to bear cost of this Appeal.

5. By the consent, this Appeal was heard by way of written submissions wherein the Appellant filed their submissions on the 9<sup>th</sup> November 2015 while the Respondent filed his submissions on the 21<sup>st</sup> September 2015.

6. I have read both submissions and wish to summarize them as follows;

7. The Appellant's submission is to the effect that the Respondent's case at the trial court had been to the effect that he had entered into a contract with the Appellants' agent one Michael Wachira Thiga in June 2004 for the sale of a parcel of land to be excised out of plot No. Laikipia/Ngobit/Subuko/Block 2/919 Wiyumiririe.

8. That he had banked the money into the Appellant's bank account and had given the agent the banking slips. That later on it had transpired that the said parcels of land had been sold to other persons wherein the Respondent sought from the court specific orders to issue to the Appellant directing the appellant to give him one of the two plots owned by the Appellant.

9. The Appellant's contention is that at no time had she entered into any sale agreement with the Respondent and neither had she entered into any agency relationship with one Michael Wachira Thiga to sell any of her plots.

10. The Appellant further submitted that suit land in question, being an agricultural land where consent from the Land Control Board was a mandatory requirement, she had not attended any Land Control Board sittings and neither was any consent issued for the transfer of the land for the transaction of the specific performance to issue.

11. That despite this lacuna the trial Magistrate went ahead to deliver judgment in favor of the Respondent directing the Appellant to transfer either of her suit lands to the Respondent.

12. The Appellant's appeal was therefore based on the fact that pursuant to the sale agreements produced by the Respondent as exhibit 2(b), 3(b) and 4(b), there had been no valid contract between the Appellant and the Respondent herein as the same were between the Respondent as the purchaser and one Michael Wachira Thiga as the Seller. There was nowhere on the agreements showing that the said Michael Wachira Thiga was entering into the agreement on behalf of the Appellant herein.

13. That further, the said agreement was not in conformity with the laid down provisions of Section 3 of the Law of Contract Act in that the Appellant who was the seller of the land had not signed on the sale agreement and neither was her signature attested thereon.

14. The appellant's further contestation was that there was no agency relationship between her and the said Michael Wachira Thiga upon whose actions would bind her more so as regards the selling of the land. The Appellant referred the court to the document that was produced in court as exhibit 1 entitled 'Authority to Sell/Subdivide Land.' Pointing out that the said document was clear to the effect that that the authority that had been given to Michael Wachira Thiga was to subdivide the Appellant's land on her behalf only. The same did not authorize him to sell the land thereafter. That if at all it had authorized him to sell the land then it ought to have contained the selling prices for the plots.

15. The Appellant relied on the case of **Mapis Investment (K) Ltd vs. Kenya Railways Co-operation** [2006] eKLR to submit that the said Michael Wachira Thiga did not produce any document to prove that he was registered commission agent so as to be deemed an agent of the Appellant.

16. The Appellant further submitted that from the tone of the judgment, the trial magistrates had clearly been influenced by extraneous matters. That the trial magistrate's judgment was based on misdirection to the effect that even after the Respondent had testified that he had entered into the contract for parcel No. 11, the trial Magistrate proceeded to grant the Respondent's claim for issuance of an alternative parcel of land owned by the Appellant instead of allowing him to seek for a refund of the money paid in the contract.

17. That the trial Magistrate's order to the Appellant to pay to the Respondent costs of the suit plus interest from the first day of entering the transaction was absurd and illogical. That costs are awarded at the end of the trial and therefore the trial magistrate erred in decreeing that the costs attract interest from the first day of entering into the transaction.

18. The Appellant thus submitted that they had showed enough cause as to why the Appeal should be upheld with the prayer so sought. She also prayed that there should not be orders for refund of purchase money as the same was not sought for in the trial court. That if the Respondent was desirous to get his refund, then he ought to file suit for the same.

19. The Appeal was opposed by the Respondent whose submissions were to the effect that the filed submissions by the Appellant should be dispensed with and not considered as the same had been filed way after the time within which leave had been sought to file them had lapsed.

20. The Respondent's submission was to the effect that the plaint was filed for a claim over a commercial plot that he had bought through the Appellant's agent one Michael Wachira Thiga. That he had produced three (3) agreements for sale as exhibits as well as bank deposit slips in

the trial court to confirm the fact that he had indeed transacted for the sale of the suit property for consideration.

21. That after making the payments, he had been informed that the Appellant had sold the same piece of land to a third party. That his bid to get an alternative land from the Appellant was in vain as her agent had placed a caution on the same.

22. The Respondent was categorical that the said agent was a broker/agent for the Appellant who had instructions to scout for buyers and take them to the Appellant for negotiations /Bargaining and/or conducting land-sale deals and transactions.

23. That although the Respondent had produced three deposit slips in court as evidence that the purchase money had been deposited in her bank account, the Appellant chose not to admit to that fact to which the Respondent submits that she (Appellant) was not being truth full.

24. The Respondent submitted that despite notice to attend the Land control sessions, the Appellant had refused to oblige and could not now come to court to state that the transaction was void because there was no consent, that notwithstanding, that the suit land was not an agricultural land but a commercial plot in an urban area and therefore there was no need to acquire the said consent which was the Appellant's sole ground of Appeal.

25. The Respondent further submitted that the same transaction had been carried out by 8 other people who had subsequently procured their titles but wherein the Appellant had claimed that these titles were fraudulent. It was there for the Respondent's submission that all the said 8 persons could not all have fraudulently obtained their titles without the Appellant's knowledge.

26. The Respondent was categorical that he had bought the suit land for consideration and had commenced enormous developments thereon. He further submitted that he had complied with the requirements of Section 23 of the Law of contracts in terms of the ingredients for disposition of an interest in land, written agreement, terms, consideration and attestation by witness and further that the acts of an agent were binding against his principal.

27. They submitted that having established that there existed an Agency relationship between the Appellant and Michael Wachira Thiga that the trial Magistrate's court had arrived at a just finding and that the present appeal ought to be dismissed with fill cost.

28. I find in the present circumstance, that the subject matter and cause of action in this matter was whether there had existed an Agency relationship between the Appellant and Michael Wachira Thiga so as to legalize the agreement entered between the two of them. And if such relationship existed, whether the Respondent was entitles to an alternative piece of land as sought for in his prayers.

29. Matters or determination are therefore as follows;

- i. Whether there was an agency relationship between the Appellant and one Michael Wachira Thiga
- ii. Whether there was a contract between the Appellant and the Respondent.
- iii. Whether the transaction which is the subject of this suit become void in the absence of the consent.

30. Based on the decided case of **Selle vs. Associated Motor Boat Company Ltd, [1968] EA 123**, this being a first appeal, I am enjoined to revisit the evidence that was before the trial court afresh, analyze it, evaluate it and come to my own independent conclusion. The ordinary caution that I should equally bear in mind and make allowance for is the fact that the trial court had the benefit of seeing the witnesses, hearing them and observing their demeanor, which is diminished in this Appeal because the hearing took place before the Magistrate.

31. I shall endeavor to analyze and evaluate the case herein afresh.

32. Briefly, the evidence adduced at the trial court before *A.B Mongare* (SRM) was that the Respondent herein had testified that in the year 2004 he had wanted to buy a piece of land and so he had asked one Michael Wachira Thiga whom he knew as a land broker if he had land to sell. The answer was affirmative and the aid broker showed him land parcel Laikipia 919 an informed him that he was selling the same on behalf of the Appellant herein Cecilia Nyambura for Khs 80,000/=.

33. The broker also showed him a letter of authority to subdivide and sell which agreement was produced as exhibit 1 and they agreed that the purchase price would be paid in three installments by depositing the same in the Appellant's bank account wherein the pay slips would be given to the broker Michael Wachira Thiga

34. That the first installment of Ksh 50,000/= was deposited in the Equity Bank Nyahururu branch on the 28<sup>th</sup> June 2006 whereupon the Respondent and the broker signed an agreement to that effect which agreement and deposit slip were produced in court as exhibit 2(a) and (b)

35. The second installment of Ksh 15,000/= was deposited in the Equity Bank Nyahururu branch on the 31<sup>st</sup> October June 2006, again the parties signed an agreement to that effect which agreement was produced as exhibit 3 (a) and (b).

36. The third installment of Ksh 15,000/= was again deposited in the Equity Bank Nyahururu branch on the 29<sup>th</sup> December 2006, wherein again the parties signed an agreement to that effect which agreement was produced as exhibit 4(a) and (b).

37. After full payment, the Respondent inquired from Michael Wachira Thiga on the title deed wherein he was informed that the Appellant

had sold the plot to a 3<sup>rd</sup> party.

38. That thereafter through his Counsel, the Respondent wrote a demand letter dated the 7<sup>th</sup> April 2011 produced as exhibit 5, to the Appellant who vide hers dated the 13<sup>th</sup> April 2011 and produced as exhibit 6 denied any claim.

39. That the Respondent conducted a search on the properties owed by the Appellant and found that she owed another plot being *Laikipia/Ngobit/Subuko/Block 2/3549 Wiyumiririe* as evidenced by exhibit 7 to which he now lay claim since he deposited the money in her account and bought land through her agent.

40. Michael Wachira Thiga who testified as the Respondent's witness number 2, confirmed the evidence of the Respondent in a far as the purchase of the plot was and confirmed that he had authority from the Appellant to sub-divide and sale the piece of land *Laikipia/Ngobit/Subuko/919(Wiyumirire* on her behalf on commission basis. He produced the said authority as exhibit 1.

41. That when they fell out with the Appellant because of selling the suit plot and another plot to 3<sup>rd</sup> parties, he had cautioned the suit land. That after the fall out, the Appellant through her counsel and vide a letter dated the 15<sup>th</sup> January 2011, asked him to account for the cash he had dealt with. He produced the demand letter as exhibit 8.

42. He was categorical that he was the Appellant's agent and had been instructed to sub divide and sale the plots on behalf of the Appellant wherein the appelland had signed all the consent forms but that the Respondent did not get the consent as he had had not paid the or the title.

43. The Appellant, Cecilia Nyambura testified that she was a farmer and that although one *Michael Wachira as a broker to her plots yet he sold her plots and got titles without her consent. She denied ever having sold land to the Respondent and that upon hearing that money had been deposited in her account, she had instructed her Counsel to write to Michael Wachira demanding that he account for the same.*

44. *She denied ever giving any consent to Michael Wachira to sell the suit land to the Respondent and stated that if any money was deposited in her account for the purchase of the suit property, she was ready to withdraw the same and refund it as she was not ready to sell any plot to the Respondent since she had no agreement with him.*

45. Looking at the evidence adduced in court, it is not in dispute that the suit land in issue was an agricultural land and that consent had to be sought from the Land control Board which was not done, further, and more so a demand letter dated 15<sup>th</sup> January 2011 which was marked as Plaintiff's exhibit 8 and addressed to Michael Wachira Thiga-pw2, the same was clear to the effect that Michael Wachira Thiga had been appointed by the Appellant as her agent.

46. The specific terms used at paragraph 1 and 2 of the demand letter were:

*i. That our client is the registered owner of LR No. Laikipia/Ngobit/Subuko/919(Wiyumirire)which was subdivided into 16 plots*

*ii. That our client appointed you as an agent for the purpose of sale of the said plots and that you indeed sold 11 plots to various people (emphasis my own)*

47. From the framing of the said letter, what comes out clearly is that indeed the Appellant had contracted PW2 to act as her agent so as to help her sell plots of land, the subject suit having been one of the 16 plots that had emanated from the subdivision of the mother land being LR No. *Laikipia/Ngobit/Subuko/919(Wiyumirire)*.

48. Further evidence was through the production of exhibit 1 which was an authority given to Pw2 by the Appellant to sell/subdivide the piece of land *Laikipia/Ngobit/Subuko/919(Wiyumirire)*.

49. The definition of the agent-principal relationship in **Bowstead and Reynolds on Agency Seventeen Edition, Sweets Maxwell Page 1-001** is as follows:-

*"... a relationship which exists between two persons, one whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts."*

50. Based on this definition as well as on the evidence adduced in court, I am satisfied that indeed there existed such relationship between the one Michael Wachira Thiga and the appelland herein.

51. Having found so the next issue to tackle is whether there was a contract between the Appellant and the Respondent. The Respondent had produced the authority to sub-divide and sell the plot with the name of the Appellant and her identity card affixed thereon as Pw 1, deposit slip of the payment of the first installment of Ksh 50,000/= deposited by the Respondent's in the Appellant's bank account in the Equity Bank Nyahururu branch on the 28<sup>th</sup> June 2006 and an agreement signed between him and the appelland's broker as exhibit 2(a) and (b), deposit slip of the second installment of Ksh 15,000/= made on the 31<sup>st</sup> October June 2006, with the agreement as exhibit 3 (a) and (b) as well as the third deposit slip of Ksh 15,000/=deposited on the 29<sup>th</sup> December 2006, and an agreement thereon as exhibit 4(a) and (b).

52. There was sufficient evidence pointing out that indeed Mr. Michael Wachira Thiga entered into an agreement with the Respondent on behalf of the Appellant thus she cannot now turn around to state that she did not contract Michael as her agent.

53. Having found so, it was therefore incumbent upon the Appellant's agent to get all the required documents so as to facilitate the smooth transfer of the land to the Respondent, however as the evidence revealed, the Appellant refused to meet her end of bargain by obtaining the necessary consent as required by *Section 6 of the Land Control Act*. And further sold the land to a third party.

54. Which now brings us to the last and crucial issue for determination which is whether the above transaction become void in the absence of the consent.

55. The Appellant has hinged her Appeal on the grounds that consent was not sought from the Land control board. I have perused Section 6(3) of the Land Control Act, Cap 302 Laws of Kenya, which declares that any transaction involving a controlled transaction in land to be null and void if not sanctioned by the relevant land control board.

56. Section 6 (1) of the Land Control Act provides as follows:

*“Each of the following transactions –*

*(a) the sale, transfer, lease mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;*

*(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations 1861 for the time being apply;*

*(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a Private Company or Co-operative Society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the Land Control Board for the land control area or division in which the land is situated has given its consent in respect to that transaction in accordance with the Act”*

57. From the above it is clear that the transaction between the Respondent and the Appellant's agent was rendered null and void and therefore un-enforceable.

58. This being the scenario thereof what then becomes of the matter? This court is aware that in the case of ***Macharia Mwangi Maina & Others vs. Davidson Mwangi Kagiri C.A Civil Appeal No. 26 of 2011*** as considered with ***CIVIL APPEAL No. 26 and 27 of 2011 [2014] e K.L.R*** (the ***MAINA*** case) the court held that;

*‘...no man shall benefit from his own wrongdoing and equity detests unjust enrichment...’*,

59. However this court was faced with a similar scenario involving the same appellant in the Nyahururu Environment and Land Court Appeal No. 6 of 2017 between Cecilia Nyambura Murunga vs. Stephen Kuhora Kingo'ri, wherein I was guided by the case of ***David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR*** wherein the court of Appeal held that:

*We can quote a few consistent decisions of the courts in Kenya that hitherto have given full effect to the provisions of the Land Control Act. In **Leonard Njonjo Kariuki vs Njoroge Kariuki alias Benson Njonjo, CA. NO. 26 OF 1979** this Court affirmed that once the land in question was proved to be agricultural land within a controlled area, transactions affecting it were controlled transactions which in law became void in the absence of consent from the land control board. And in **Karuri vs Gitura [1981] KLR 247** the Court concluded that the provisions of the Land Control Act are of an imperative nature to the extent that there is no room for the application of any doctrine of equity to soften its provisions.*

60. I must therefore continue to follow that path and make a finding to the effect that since the Respondent had prayed for an order for specific performance to compel the appellant to deliver the legal transfer of the suit land being Laikipia/Ngobit/Subuko/ Block 2/3546(Wiyumirire) to the Respondent, to which the trial magistrate had granted:

61. I find that an order of specific performance is normally made on the premise that a party against whom it is sought has failed to fulfill his contractual obligations and should be compelled to do so. Having already made a finding that the agreement in dispute involved sale of agricultural land wherein no consent from the land control board had been obtained authorizing the transaction, the whole agreement or contract became void. In the circumstance, therefore, an order of specific performance could not be granted for the whole transaction became null and void for all purposes.

62. In conclusion thereof I make the following orders:

- i. I allow the appeal and set aside the judgment and decree of the trial Magistrate's Court delivered on 10<sup>th</sup> January 2012.
- ii. The Appellant to refund to the Respondent the purchase price of Ksh. 80,000/ forthwith with interest at the bank rate from the year 2006 to date.
- iii. Each party to meet their own costs in this Court and in the Court below.

**Dated and delivered at Nyahururu this 26<sup>th</sup> day of February 2018.**

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE